

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No: A299/2011

In the matter between:-

ITUMELENG FORTUNATE MOTICOE

1st Appellant

KAGISHO SIDWELL CHOEU

2nd Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, J et THAMAGE, AJ

JUDGMENT BY:

THAMAGE, AJ

HEARD ON:

15 OCTOBER 2012

DELIVERED ON:

14 DECEMBER 2012

[1] This is an appeal from the Regional Court, Bloemfontein against conviction only.

[2] Both appellants were convicted of rape and sentenced on the 26 October 2010 by the Regional Court magistrate of Bloemfontein. They were each sentenced to 17 years imprisonment.

- [3] Briefly, the grounds of appeal are that the court *a quo* misdirected itself by concluding that there was a duty upon the appellants to disclose their alibi, that he prescribed as to how the legal representative should handle his cross-examination hence the legal representative was hampered to test the reliability of the state witnesses.
- [4] Further grounds are that the court *a quo* erred in finding that the identification of the applicants by the complainant is reliable. That the court erred in cross-examining the appellants instead of asking questions to clarify issues and that the court erred in finding that the evidence of the appellants was not credible.
- [5] Although the respondent's heads of argument were documents opposing the appeal but during the hearing seemed to be conceding to some of the arguments from the appellants' counsel. I will return later to this aspect.
- [6] Briefly, the facts of the matter are as follows:
- 6.1 Complainant testified that the incident happened when she was going home after visiting a neighbour. It was dark. After entering the yard, she saw two males jumping the

fence and then the two attacked her. They pushed her onto the ground and appellant 1 closed her mouth so that she could not scream. Appellant 1 undressed her of her underwear and he then raped her. After appellant 1 had finished raping her, appellant 2 also raped her. Complainant further testified that she knew both appellants since 1970 and that she knew their names namely, Itumeleng and Shima.

- 6.2 Complainant stated that she identified the two appellants by their voices and also stated that she saw their faces because there was a dim light. The rape happened outside her house. Complainant also testified that on the day in question she never drank any liquor.
- 6.3 After the incident, appellants ran away and she made a report to her daughter and told her daughter the names of her assailants.
- 6.4 The complainant went to the hospital and thereafter accompanied the police and showed them the two appellants. They were then arrested, although not from their homes.
- 6.5 Appellants' version put to the complainant under cross-examination was to the effect that complainant was at

Sehloho's tavern and that since the appellants left Sehloho's tavern around 03H30 and they could not have raped her. The complainant vehemently denied that she had visited that tavern that night or that she had taken any liquor. After the evidence of the third state witness, namely the police officer, the state conceded that the complainant was at Sehloho's tavern and that the appellants need not call witnesses to testify about that:

[7] The evidence of the complainant's daughter is that complainant informed her that she was raped by two males, namely Shima (appellant 2) and his friend. Under corss-examination she testified that the complainant was "moderately drunk".

[8] Appellants' version is briefly as follows:

8.1 Appellant 1 stated that on the day in question he was with appellant 2 and they went to Mollies tavern and later went to Sehloho's tavern. After they drank liquor, they left around 23H00 to appellant 2's house and he then went to spent the night with an unknown lady (whom they met for the first time) at the tavern. Under cross-examination, he

denied having seen the complainant at the tavern of Sehloho.

8.2 Appellant 1's witness, namely the lady who spent the night with appellant 1, testified that she was with appellant 1 from Sehloho's tavern until the following day. That appellant 1 spent the night in question at her place. She testified that the reason she came to testify was on request of appellant 1's brother who came and informed her of the arrest of appellant 1.

8.3 Appellant 2 testified that he was in the company of appellant 1 and appellant 1's witness. He saw complainant that night at the time when he was at the counter at Sehloho's tavern buying beer.

[9] It is trite the appeal court can only interfere with the decision of the trial court when there is a material misdirection. **S v FRANCIS** 1991 (2) SACR 198 (A) at 204i – e:

“This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)). Accused No 5's complaint is that the trial Court failed to evaluate D's evidence properly. It is not suggested that the Court misdirected

itself in any respect. In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence - a reasonable doubt will not suffice to justify interference with its findings (*R v Dhlumayo (supra)*; *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 (A) at 452A-B). Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony."

[10] In the present case, the evidence to the effect that the complainant was raped is not in dispute or contradicted. The question which was to be resolved by the trial court was who raped the complainant and, in particular, whether it is the two appellants who raped the complainant.

[11] Evidence of the state in so far as the actual rape is concerned is based on evidence of a single witness, namely the complainant herself. Section 208 of the Criminal Procedure Act, No 51 of 1977 is to the effect that an accused person may be convicted of any offence on the single evidence of any competent witness.

[12] The complainant on her evidence stated that she never took any liquor on that day and was never with the two appellants at the tavern. The evidence of her daughter is to the effect that she indeed took liquor. Also the evidence of the investigating officer is to the effect that "...en sy het toe verder vir my meegedeel dat sy saam met hierdie mense die vorige aand by 'n drinkplek gesit het."

[13] Futhermore, she testified that she told her daughter the names of her assailants whilst her daughter said that she told her that she was raped by Shima "and his friend". She did not identify this friend. Other discrepancies on the evidence of the complainant is that she initially said she was from the house across the road later in her evidence said she was from a family member down the road. There was also inconsistency with regards to the lighting at the scene.

[14] During examination-in-chief the complainant *inter alia* testified as follows:

State: "Mevrou, het u hierdie twee persone se gesigte gesien of hoe het u hulle geïdentifiseer?"

Complainant: “Ek het gehoor met hulle se stemme nadat Itumeleng vir my op die grond neergegooi het en Shima ook daar aangekom het.”

During cross-examination her evidence was as follows:

Question: “You said it was dark, am I correct?”

Answer: “Yes it was dark next to the garage.”

Question: “And then will I be correct if I said you identified the accused by their voices?”

Answer: “One of them I identified by his voice, I identified Itemeleng by his voice at the time when he grabbed me.”

[15] It must be noted that after the complainant had said that she identified the two appellants by their voices, she then said she saw their faces. “Was u in staat om hulle gesigte te sien ---- Ja ek het dit gesien.”

[16] The inconsistency is to the effect that she initially identified the two with their voices but later changed that she only identified Itumeleng by his voice. Furthermore she also said that she had seen the two appellants through a dim light. I will later on in my judgment touch on the evidence concerning identification of the two appellants, which accordingly is a vital factor in determination of the guilt or otherwise of the two appellants.

- [17] It is trite law that the evidence of a single witness should be approached with caution - **R v MOKOENA** 1956 (3) SA 81 (A). The exercise of caution should however not overrule the exercise of common sense. See **S v AARDMAN EN ANDERE** 1968 (2) SA 33 (A).
- [20] The court *a quo* in its judgment came to the following conclusion: “Ek bevind gevoglik dat beskuldigdes 1 en 2 wat die hele dag in mekaar se teenwoordigheid was en die aand ook in mekaar se teenwoordigheid was toe die klaagster die taverne verlaat het, haar agtervolg het en nie baie ver van die taverne nie, haar by haar eie huis in die tuin verkrag het.”
- [21] I find it difficult to see how the court *a quo* came to this conclusion. It is not clear whether this is an inference that it drew. There is no evidence on record regarding the time at which the incident happened. There is also no evidence on record to the effect that the two appellants saw the complainant leaving the tavern or followed the complainant from the tavern. To the extent that the court *a quo* may have drawn an inference on this aspect, the test is that the inference sought to be drawn should be consistent with the proven facts and should be the only reasonable inference that

can be drawn under the circumstances, See **R v BLOM** 1939 AD. Even if it were to be accepted that the complainant and the appellants were at the tavern, the reasonable inference drawn by the court *a quo* is not the only inference that can reasonably be drawn under the circumstances.

- [22] I now turn to the issue of identification of the two appellants. Complainant stated in her evidence that she has been knowing the two appellants since 1970. She also testified that she identified the two appellants by their voices. Later when she was asked whether she saw their faces she answered in the affirmative, saying there was a dim light and one can see a person when he is close. It is also her evidence that the rape lasted for a minute per each appellant. Her initial evidence was that it was dark. The version of her identifying the two appellants by their voices was repeated during cross-examination where she said it was dark next to the garage and she could identify Itumeleng by his voice at the time he grabbed her. There has been no evidence as to how frequently does she speak to the appellants. Hers is the only evidence tendered by the state relating to the scene of rape.

- [23] It is trite law that evidence of identification should be approached with caution because of the fallibility of human observation. See **S v MTHETHWA** 1972 (3) SA 766A. The confidence and sincerity of a witness are not enough, **S v MEHLAPE** 1963 (2) SA 29 A.
- [24] Various factors to be considered are mentioned in **S v MTHETWA** *supra* e.g. lighting, visibility, eyesight, proximity, opportunity for observation, prior knowledge of the accused, accused's gait, built etc.
- [25] From the evidence during cross-examination she said only Itumeleng spoke, meaning appellant 1. How would she then have identified appellant 2?
- [26] As I mentioned earlier, the complainant later on said she saw them by a "dim light". There has been no evidence as to the source of that dim light, whether electrical or otherwise and where the light was from, whether from the street light, light at the house etc.. What one also can point out is that she was accosted next to the garage inside her yard and that during cross-examination she said it was dark next to the garage. One finds it difficult to reconcile evidence of dim light and darkness next to the garage.

See **S v SITHOLE AN OTHERS** 1999 (1) SASV 585 (W) at 591:

“Where a conviction depends on that (identification) evidence alone, a court must quite obviously be satisfied that the witness is truthful. What is perhaps more important though, is that there must be no reasonable doubt that the witness is not mistaken. In our view that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against.”

[27] I turn now to the complainant’s opportunity of observation specifically as regards to time. There is no evidence regarding how long the complainant observed the appellants. What is on record is that each rape lasted for a minute. The impression that one gets is that the complainant only became aware of her assailant’s presence when she was grabbed and thrown to the ground. I am of the view that this duration is not enough for a reliable identification, given that visibility at the scene was not good, the complainant’s mental state of being frightened or shocked.

[28] A bald statement that the accused is the person who committed the crime is not enough. That statement should be explained, tested and investigated. See **R v SHEKELELE** 1953 (1) SA 636 (T) at 638 and also **R v MPUTING** 1960 (1) SA 785 (T).

[29] The state did not ask questions to ventilate the issue of identity. The court *a quo* also did not do so. It ought to have probed more with regards to visibility at the scene so as to determine the truth. See **GUNILE v S** [2003] JOL 10843 (SCA) unreported. The complainant's evidence with regards to identification was not corroborated. In view of the poor quality of her evidence as already outlined above, I find that her evidence of identification is not reliable. It does not pass muster against the principle laid down in the case of **S v CHARZEN** 2006(2) SACR 143 (SCA).

[30] I am mindful of the fact that the evidence should not be evaluated in components, that is, the evidence should be evaluated in its totality. See **R v KHUMALO AND ANDERE** 1991 (4) SA 310A.

[31] The appellant's version was that of an alibi. There have been improbabilities correctly pointed out by the court *a quo*. For example appellant 1 stating that he spent the night at the house of

one female but could not give the court the name of that female. This did not relieve the state of the burden of discharging the onus upon it, i.e. of proving the guilt of the appellants beyond reasonable doubt. The correct approach is to consider the alibi in the light of totality of evidence. Even when a defence of alibi has been raised the state still has the onus of proving its case beyond reasonable doubt. The rejection of an alibi does not, in itself, prove the guilt of the accused, see **S v THEBUS** 2003 (2) SACR 319 (CC).

[32] I am of the view that having considered the cautionary rule in respect of the evidence of a single witness as well as identification of the two appellants, the evidence of the complainant is not satisfactory in all material respects especially relating to the identification of the appellants as the perpetrators of the rape. The prosecution accordingly failed to prove the guilt of the two appellants beyond reasonable doubt.

[33] The following order is made:

1. Appeal by 1st appellant and 2nd appellant against their conviction is upheld.

2. The conviction and sentence imposed on both appellants by the court *a quo* is set aside.

S. J. THAMAGE, AJ

I concur.

M. B. MOLEMELA, J

On behalf of applicants: J D Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. S. Mthethwa
Instructed by:
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